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185-229

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 75.

MICHAEL RETZER, PLAINTIFF IN ERROR,

vs.

ALFRED M. WOOD, COLLECTOR OF INTERNAL REVENUE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you between Michael Retzer, plaintiff, and Alfred M. Wood, defendant, a manifest error hath happened to the great damage of the said plaintiff, as by his complaint appears, we being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, eighteen hundred and eighty, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 23d day of September, in the year of our Lord one thousand eight hundred and eighty.

[SEAL.] JOHN I. DAVENPORT, *Clerk.*

The foregoing writ is hereby allowed.
N. Y., Sept. 23d, 1880.

SAM'L BLATCHFORD.

2 (Indorsed:) E. & C., A 304. U. S. Supreme Court. Michael Retzer, plaintiff in error, against Alfred M. Wood, defendant in error. Original writ of error. Stanley, Brown & Clarke, pl'ff' att'ys, 195 B'way.

Due service of a copy of the within is hereby admitted.
N. Y., Sept. 24, 1880.

STEWART L. WOODFORD,
U. S. Att'y.

E. B. H.

(Stamp:) U. S. circuit court, Sep. 24, 1880. John I. Davenport, clerk.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Joseph M. Deuel, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do

3 hereby certify that the following pages, numbered from four to sixty-six, inclusive, contains a true and complete transcript of the record and proceedings had in said court in the case of Michael Retzer, plaintiff in error, against Alfred M. Wood, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this sixth day of October, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the said United States the one hundred and fifth.

[SEAL.] J. M. DEUEL, *Clerk.*

4 *Summons.*

Superior court of the city of New York.

MICHAEL RETZER, PLAINTIFFS,
against
ALFRED M. WOOD, DEFENDANT.

To the defendant:

You are hereby summoned and required to answer the complaint in this action, which will be filed in the office of the clerk of the superior court of the city of New York, at the court-house in said city, and to serve a copy of your answer to the said complaint on the subscribers, at their office, at No. 16 Wall street, in said city, within twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid the plaintiffs in this action will apply to the court for the relief demanded in the complaint.

Dated N. Y., May 26, 1874.

STANLEY, BROWN & CLARKE,
Plaintiff's Attorneys, 16 *Wall St.*

5 (Indorsed:) N. Y. superior court. Michael Retzer, plaintiffs, against Alfred M. Wood, defendant. Summons. Stanley, Brown & Clarke, plaintiff's attorneys, 16 Wall st., New York.

6 The President of the United States of America to the judges of the superior court of the city of New York, greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause commenced before you against A. M. Wood, defendant, by M. Retzer, plaintiffs, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 23rd day of July, 1874, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness Morrison R. Waite, esquire, Chief Justice of the Supreme Court of the United States, the 14' day of July, in the year one thousand eight hundred and seventy-four.

[L. S.] JOHN I. DAVENPORT, *Clerk.*

STEWART L. WOODFORD,
Defendant's Attorney.

7 (Indorsed:) U. S. circuit court. A. M. Wood ads. M. Retzer. Copy certiorari. George Bliss, defendant's attorney.

SIR: Take notice that the within is a copy of a certiorari this day issued

out of the circuit court of the United States for the southern district of New York.

New York, July 14, 1874.

Yours,

GEORGE BLISS,
Defendant's Attorney.

Plaintiff's Attorney.

Due service of a copy of the within and of the above notice is hereby admitted.

New York, July 15, 1874.

STANLEY, BROWN & CLARKE,
Plaintiff's Attorney.

To .

8 THE UNITED STATES OF AMERICA:

Circuit court of the United States for the southern district of New York, in the second circuit, of the term, in the year one thousand eight hundred and seventy.

MICHAEL RETZER, PLAINTIFF,
vs.
ALFRED M. WOOD.

The plaintiff, by Stanley, Brown & Clarke, his attorneys, come here into court and suggests and gives the court now here to be informed that heretofore, to wit, on the 26th day of May, one thousand eight hundred and seventy-four, this action was commenced by summons in the superior court of the city of New York, according to the laws of the State of New York and the rules and practice of said court, in favor of the said plaintiff against the defendant herein, upon the causes of action hereinafter set forth; that the said defendant afterwards, by his attorney, George Bliss, esquire, duly appeared in said action, and thereupon, on the 14th day of July, in the year one thousand eight hundred and seventy-four, the said action was duly removed by writ of certiorari for further prosecution in this court, according to the act of Congress in such case made and provided; that upon the removal of said action it is made to appear to this court that no copy of the record and proceedings therein in the said superior court can be obtained, which allegation the defendant admits to be true.

Wherefore let the plaintiff proceed de novo and file a declaration of his cause of action, and let the parties thereupon proceed as in action originally brought in this court.

And the said plaintiff, by said attorneys, complains of said defendant of a plea of trespass on the case for promises, for that whereas said defendant, on the 7th day of August, eighteen hundred and sixty-eight, at the city of Brooklyn, eastern district of New York aforesaid, being then and there collector of internal revenue for the eastern collection district of New York, was indebted to said plaintiffs in the sum of two hundred and fifty and $\frac{}{100}$ dollars, lawful money of the United States of America, unlaw-

fully demanded, exacted, and received at said city by the said defendant, then collector of internal revenue for said district, under color of a law of the United States for the collection of internal revenue, and paid by the said plaintiff under protest.

And being so indebted, he, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money when he, said defendant, should be thereunto afterwards requested.

And whereas, also, the said defendant afterwards, to wit, on the same day and year last aforesaid, at the place aforesaid, was indebted to the said plaintiffs in the further sum of two hundred and fifty thousand dollars lawful money of the United States of America, for money before that time lent and advanced by said plaintiff to said defendant, and at the special instance and request of the said defendant; and for other money by the said plaintiff before that time paid, laid out, and expended for the said defendant, and at the like request of the said defendant; and for other money by the said defendant before that time had and received to and for the use of the said plaintiff. And being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money in this count mentioned when he should be thereunto afte'wards requested.

Nevertheless said defendant, although often afterwards requested so to do, has not paid said sums of money, or any or either of them, or any part thereof, to the said plaintiff, but to pay the same or any part thereof to the said plaintiff has hitherto refused, and still does refuse, to the damage of the said plaintiff of five hundred dollars, and therefore the said plaintiff brings suit, &c.

STANLEY, BROWN & CLARKE,
Attorneys for the Plaintiff, 16 *Wall St.*

9 (Indorsed:) U. S. circuit court. Michael Retzer vs. Alfred M. Wood. Declaration.

To GEORGE BLISS, Esq., *Def't's Att'y:*

SIR: Please take notice that a rule has been entered in the book of common rules in the office of the clerk of this court at the city of New York, requiring the defendant to plead to the declaration in twenty days after service of a copy thereof and notice of said rule on his attorney, or judgment, &c.

New York, November 4, 1875.

STANLEY, BROWN & CLARKE,
Attorneys for Plaintiff, 16 *Wall Street.*

Due service of a copy of within declaration and above notice is hereby admitted this day of May, 1876.

Def't's Att'y.

10 U. S. circuit court.

MICHAEL RETZER
vs.
ALFRED M. WOOD.

SIR: Please to take notice that the following is the bill of particulars of items of the plaintiff's demand in the above-entitled action, to wit, moneys exacted by compulsion and duress, and under color of the internal revenue laws of the United States by the defendant, as collector as aforesaid, from and paid by the plaintiffs, at the city of Brooklyn, in said district, as a special tax upon the business or occupation of express carrier, as per schedule hereto annexed, with legal interest on the amounts therein named from the dates of payment, respectively.

Dated New York, Aug. 14th, 1874.

STANLEY, BROWN & CLARKE,
Pl'ff's Att'ys, 16 Wall St.

To GEO. BLISS, Esq.,
Def't's Att'y.

11 *Schedule.*

Dates of payments.	For tax on what month.	Am't paid.
1866.		
Feb'y 28	Dec., 1865, & Jan'y, 1866	$3 90
Apr. 18	February, 1866	1 50
May 1	March, "	2 65
July 19	April & May, "	6 17
Feb'y 26	June, July, Aug., Sept. & Oct., Nov. & Dec., 1866	7 67
1867.		
June 10	Jan'y, 1867	2 31
Oct. 24	Feb'y to June & July, 1867	15 33
Dec. 14	Aug't & Sept., 1867	6 20
" "	Oct., 1867	3 21
1868.	Dec., 1867	2 63

STANLEY, BROWN & CLARKE,
Pl'ff's Att'ys.

(Endorsed:) U. S. circuit court. Michael Retzer vs. Alfred M. Wood. Bill of particulars. Stanley, Brown & Clarke, pl'ff's att'ys, 16 Wall st. To Geo. Bliss, esq., def't's att'y.

12 In the circuit court of the United States for the southern district of New York.

MICHAEL RETZER
vs.
ALFRED M. WOOD.

And the said defendant, by George Bliss, esquire, his attorney, comes and defends the wrong and injury, when, &c., and says he did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against him; and of this he puts himself upon the country.

And the said plaintiff doth the like, etc.

GEORGE BLISS,
Def't's Att'y.

(Endorsed): U. S. circuit court, southern district of New York.
13 Retzer vs. Wood, copy plea.

UNITED STATES ATTORNEY'S OFFICE,
New York, Oct. 2, 1876.

STANLEY, B. & C., *Defendant's Attorneys:*

SIR: Take notice that within is a copy of the plea in the action above entitled, which has been filed in the office of the clerk of the circuit court of the United States for the southern district of New York, in the second circuit. Yours,

GEORGE BLISS,
United States Attorney for the So. District of New York.

NEW YORK, *Oct.* 20, 1876.

Due service of the copy of the plaintiff's within, and of the notice above, admitted this 2nd day of Oct., 1876.

STANLEY, BROWN & CLARKE,
Pl'ff's Attorney'.

14 United States circuit court, southern district of New York.

MICHAEL RETZER }
vs.
ALFRED M. WOOD. }

Agreed statement of facts.

It is agreed that the defendant, Wood, was the collector of internal revenue for the 2nd collection district of New York from the 10th day of October, 1862, to the seventh day of August, 1868, and that plaintiff resided in said 2nd collection district during the time above specified. That in the monthly assessment lists received by said collector for the respective months specified in Schedule A, hereto annexed, were assessments against the plaintiff of the respective amounts set opposite each month, respectively, the same being a tax of three per cent. on the gross amounts of the plaintiff's receipts from his business during the months specified in
15 said schedule, under the provisions of section 104 of the act of Congress entitled "An act to provide internal revenue, &c.," approved June 30th, 1864.

That defendant as such collector of internal revenue exacted and collected from plaintiff the said amounts specified in said Exhibit A, at the several dates therein specified, as a tax of three per centum of the gross amounts of the plaintiff's receipts from his business during the respective months stated in said schedule; that plaintiff's business at the time specified in said Schedule A was the carrying of goods between New York and Brooklyn, and from place in the city of Brooklyn to another place in the same city.

Plaintiff did not run regular trips nor over regular routes or ferries, but where ordered.

Plaintiff had a place in Brooklyn where he received orders on a slate from persons who wished articles sent from there to New York, or from one place in Brooklyn to another place in Brooklyn.

16 The goods were carried in wagons. They were of a miscellaneous character, such as boxes of dry goods, barrels of sugar, rolls of sole leather, trunks, and general merchandize. Plaintiff's said business was done solely upon call and at special request, and as requested plaintiff sent to any part or place in said cities, or either of them, and took baggage or freight to any part or place in said cities, or either of them; that a claim, of which the annexed, marked "Schedule B," is a copy, was presented to the Commissioner of Internal Revenue on the 28th day of May, 1873, and no decision has been had thereon, said claim having been returned by said Commissioner to the defendant for amendment on November 13, 1874, and suit herein was commenced against defendant herein on the 4th day of June, 1874.

17 SCHEDULE A.

Statement of the several amounts of tax on gross receipts paid by Michael Retzer.

Date.	Amounts.	List.	To rev. collector.
1866.			
March 28	$3 90	January	A. M. Wood.
April 18	1 50	February	Do.
May 7	2 65	March	Do.
June 19	2 87	April	Do.
July 19	3 30	May	Do.
1867.			
Feb'y 2	1 67	June	Do.
" 9	2 55	July	Do.
" 2	2 87	August	Do.
" 2	2 57	September	Do.
" 2	2 70	October	Do.
" 2	2 81	November	Do.
" 2	2 50	December	Do.
July 2	1 95	January, 1867	Do.
Oct. 24	9 87	June	Do.
" 24	2 87	July	Do.
Dec. 14	2 87	August	Do.
" 14	3 04	September	Do.
" 14	3 21	October	Do.
" 14	2 97	November	Do.
1868.			
Feb'y 24	2 63	December	Do.

18 The above statement of facts, as corrected, is agreed to.
June 18th, 1879.

STEWART L. WOODFORD,
U. S. Attorney.

E. B. H.

19 [Timothy C. Dwight, att'y, No. 70 East 110' street, New York City.]

Claim under series 6, No. 14., for taxes improperly paid.

STATE OF NEW YORK,
County of Kings, City of Brooklyn, ss:

Michael Retzer, of the city of Brooklyn, and State and county aforesaid, being duly sworn according to law, deposes and says that† he is in business for himself only; that he was engaged in the business of local and city express carrying, and that upon the various days of the years 1866,

* Here give post-office address.
† If a member of a firm, state the fact here.

1867, 1868, and 1869 he was assessed by various assessors of the second district of said State an internal revenue tax of one hundred and sixty-nine $\frac{31}{100}$ dollars* for a tax on the gross receipts of his city express carrying business, which amount he afterwards, on the various days of said years A. D. 1866, &c., &c., paid to the various collectors of internal revenue for the said district, which assessment and payment of the
20 aforesaid tax was, as this deponent verily believes, erroneous and improper, for the following reasons, viz, that said claimant was during said years aforesaid engaged in and was carrying on an express carrying business of freight, and was not doing an express business proper, but only a local cartage and drayage business on "order" or "call" in said city of Brooklyn as wanted by the patrons of said claimant, and that said claimant did not know on one day where his "orders" or "calls" would require his vehicles to go to the next day, as he did not run his said vehicles on any direct or continuous route, course, or objective point, or cross the ferries by any regular course to and from New York, but only by such ferry as the claimant was the nearest to at the time the last "call" was made, or delivery of freight was done by this claimant. And this deponent now claims that by reason of the aforesaid erroneous assessment and payment of the said sum of one hundred and sixty-nine and $\frac{31}{100}$ dol-
21 lars he is therefore justly entitled to have the sum of one hundred and sixty-nine and $\frac{31}{100}$ dollars refunded, and he now asks and demands the same. And this deponent further makes oath that he has not heretofore presented any claim for the refunding of the above amount, or any part thereof.†

(S'g'd) MICHAEL RETZER.

Sworn and subscribed before me this 23rd day of May, A. D. 1873.

(S'g'd) CLARK SMITH,
Notary Public.

STATE OF NEW YORK,
County of Kings, ss:

I, George G. Herman, clerk of the county of Kings, & clerk of the supreme court of the State of New York in and for said county (said
22 court being a court of record), do hereby certify that Clark Smith, before whom the annexed deposition was taken, was at the time of taking the same a notary public of the State of New York in and for the said county, dwelling in said county, commissioned and sworn and duly authorized to administer oaths for general purposes; and, further, that I am well acquainted with the handwriting of such notary, and verily believe the signature to said deposition is genuine. In testimony whereof I have hereunto set my hand and affixed the seal of said county and court this 24 day of May, 1873.

[SEAL.] GEORGE G. HERMAN, *Clerk.*

Assistant assessor's certificate.

I hereby certify that I have carefully investigated the facts set forth in

* Here state for or upon what the tax was assessed.
† If a claim has been presented before, state the fact in lieu of this.

the written affidavit, and that I believe the statements to be in all respects just and true.

Assistant Assessor.

Dated , 187 , division, district.

23 *Assessor's certificate.*

I do certify that I have carefully investigated the facts set forth in the within affidavit of , and that I believe the statements to be in all respects just and true; and I further certify that from present personal examination I find the sum of dollars and cents, reported against the said on page , line , of the list on form , for , 187 ; also the sum of dollars and cents, reported against on page , line , of the list on form , for , 18 , now on file in my office, and that the tax included in the collector's aggregate receipt for the said list transmitted by me to the Commissioner of Internal Revenue, and that the claim has not heretofore been allowed in any form.

Dated , 187 . Assessor district.

24 *Collector's certificate.*

I hereby certify that I have carefully investigated the facts set forth in the within affidavit, and am satisfied that the statements are in all respects just and true; and I further certify, upon personal examination, that I find the sum of dollars and cents, reported against the said on page , line , of the list on form , for , 18 ; and also the sum of dollars and cents, reported against on page , line , of the list on form , for , 18 , now on file in my office, and that the same was paid to me on the day of , 18 , and on the day of , 18 , and are included in my aggregate receipts for said lists, the receipts amounting to $, and $, respectively, and delivered to the assessor to be transmitted to the Commissioner of Internal Revenue; and that no claim for the
25 assessment herein complained of has heretofore been presented.*

, *Collector.*

Dated, , 187 , district.

(Endorsed:) (46.) Claim for refunding taxes collected. Serial No. 75. No. of draft , $169.31. Michael Retzer, claimant. Post-Office address, Brooklyn. Verified by , collector, 2nd district of N. Y. Assessed upon gross receipts of cartage. Basis of claim: Gross receipts of cartage not taxable. Examined and rejected, March 23, 1874, by J. T. Vinson, office Int. Revenue. Received May 23, 1873. Div. 1, sec. 2.

26 (Endorsed.) U. S. circuit court so. dist. of N. Y. Michael

* If the claim has been presented before, the facts should be stated. When two or more assessments are referred to in the claim, the page, line, and form of each and every assessment should be given, both by the assessor and the collector, as indicated in the above certificate.

Retzer, plaintiff, against Alfred M. Wood, defendant. Agreed statement of facts. Stanley, Brown & Clarke, attorneys for . 195 Broadway, New York. To attorney for . Due service of copy of within is hereby admitted. Dated New York 187 . Filed in open court Oct. 30, 1879.

27 U. S. circuit court southern district of New York.

MICHAEL RETZER }
vs.
ALFRED M. WOOD. }

We hereby consent that the issues in the above action be tried by the urt without a jury, and trial by jury is hereby waived.
Dated N. Y., October 29, 1879.

STANLEY, BROWN & CLARKE,
Plff's Att'ys.
STEWART L. WOODFORD,
U. S. Attorney.

E. B. H.

(Endorsed.) C. C. of the U. S., S. D. of N. Y. Retzer *vs.* Wood. Consent to try case by court without a jury. Filed in open court Oct. 30, '79.

28 *Decision.*

U. S. Circuit court, southern district of New York.

MICHAEL RETZER }
vs.
ALFRED M. WOOD. }

The above action and all the issues therein having been tried and determined by the court without the intervention of a jury, upon stipulation by the parties in writing waiving a jury, filed with the clerk, on the 30th day of October, 1879, I do make the following

FINDINGS OF FACT.

That the defendant, Wood, was collector of internal revenue for the 2nd collection district of New York from the tenth day of Oct., 1862, to the 7th day of Aug., 1868, and that plaintiff resided in said 2nd collection district during the time above specified; that the monthly assessment lists received by said collector for the respective months between Janu-
29 ary 1, 1866, and February 25, 1868, were assessments against the plaintiff of various sums of money, amounting altogether to the sum of sixty-one dollars and thirty cents, the same being a tax of three per centum on the gross amounts of the plaintiff's receipts from his business during said months under the provisions of section 104 of the act of Congress entitled "An act to provide internal revenue, &c.," approved June 30, 1864.

That the defendant, as such collector, exacted and collected from plaint-

iff the said sum of sixty-one $\frac{30}{100}$ dollars during said months as such tax as aforesaid; that plaintiff's business at the time specified in said Schedule A was the carrying of goods between New York and Brooklyn, and from one place in the city of Brooklyn to another place in the same city.

Plaintiff did not run regular trips nor over regular routes or ferries, but where ordered.

Plaintiff had a place in Brooklyn where he received orders on a
30 slate from persons who wished articles sent from there to New York, and from one place in Brooklyn to another place in Brooklyn. The goods were carried in wagons. They were of a miscellaneous character, such as boxes of dry goods, barrels of sugar, rolls of sole-leather, trunks, and general merchandise. Plaintiff's said business was done solely upon call, and at special request; and, as requested, plaintiff sent to any part or place in said cities, or either of them, and took baggage or freight to any part or place in said cities, or either of them.

That a claim in the following words, to wit:

(46.)

Claim under series C, No. 14, for taxes improperly paid.

STATE OF NEW YORK,
County of Kings, City of Brooklyn, ss:

Michael Retzer, of the city of Brooklyn, and State and county aforesaid, being duly sworn according to law, deposes and says that he
31 is in business for himself only; that he was engaged in the business of local and city express carrying, and that upon the various days of the years 1866, 1867, 1868, and 1869 he was assessed by various assessors of the second district of said State, an internal revenue tax of one hundred and sixty-nine $\frac{31}{100}$ dollars for a tax on the gross receipts of his city express-carrying business, which amount he afterwards, on the various days of said years, A. D. 1866, &c., &c., paid to the various collectors, collectors of internal revenue for the said district, which assessment and payment of the aforesaid tax was, as this deponent verily believes, erroneous and improper, for the following reasons, viz: That said claimant was, during said years aforesaid, engaged in and was carrying on an express-carrying business of freight, and was not doing an ex-
32 press business proper, but only a local cartage and drayage business on "order" or "call," in said city of Brooklyn as wanted by the patrons of said claimant, and that said claimant did not know on one day where his "orders" or "calls" would require his vehicles to go to the next day, as he did not run his said vehicles on any direct or continuous route, course, or objective point, or cross the ferries by any regular course to and from New York, but only by such ferry as the claimant was the nearest to at the time the last "call" was made, or delivery of freight was done by this claimant.

And this deponent now claims that by reason of the aforesaid erroneous assessment and payment of the said sum of one hundred and sixty-nine $\frac{31}{100}$ dollars, he is therefore justly entitled to have the sum of one hundred and sixty-nine $\frac{31}{100}$ dollars refunded, and he now asks and demands the same.

And this deponent further makes oath that he has not hereto-

fore presented any claim for the refunding of the above amount, or any part thereof.

MICHAEL RETZER.

Sworn and subscribed to before me this 23rd day of May, A. D. 1873.

CLARK SMITH,
Notary Public.

STATE OF NEW YORK,
County of Kings, ss:

I, George G. Herman, clerk of the county of Kings, and clerk of the supreme court of the State of New York in and for said county (said court being a court of record), do hereby certify that Clark Smith, before whom the annexed deposition was taken, was at the time of taking the same a notary public of the State of New York, in and for the said county, dwelling in said county, commissioned and sworn, and duly authorized to administer oaths for general purposes; and further, that I am well acquainted with the handwriting of such notary, and verily believe the signature to said deposition is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of said county and court the 24th day of May, 1873.

GEO. G. HERMAN, *Clerk.*

Assistant assessor's certificate.

I hereby certify that I have carefully investigated the facts set forth in the within affidavit, and that I believe the statements to be in all respects just and true.

, *Assistant Assessor.*

Dated 187 . Division. District.

Assessor's certificate.

I hereby certify that I have carefully investigated the facts set forth in the within affidavit of , and that I believe the statements to be in all respects just and true; and I further certify that from present personal examination I find the sum of dollars and cents reported against the said , on page , line , of the list on Form , for , 18 ; also the sum of dollars and cents reported against , on page , line , of the list on Form , for , 187 , now on file in my office, and that the tax included in the collector's aggregate receipt for the said list transmitted by me to the Commissioner of Internal Revenue, and that the claim has not heretofore been allowed in any form. Said receipt amount' to $.

, *Assessor.*

Dated , 187 . District.

36 *Collector's certificate.*

I hereby certify that I have carefully investigated the fact set forth in the within affidavit, and am satisfied that the statements are in all respects just and true; and I further certify, upon personal examination, that I find the sum of dollars and cents reported against the said , on page line of this list on Form , for , 187 , and also the sum of dollars and cents reported against , on page line of the list on Form , for , 187 , now on file in my office, and that the same was paid to me on the day of , 187 , and on the day of , 18 , and are included in my aggregate receipts for said lists, the receipts amounting to $ and $ respectively, and delivered to the assessor, to be transmitted to the Commissioner of Internal Revenue; and that no claim for the
37 assessment herein complained of has heretofore been presented.

Collector.

Dated , 18 , district.

Was presented to the Commissioner of Internal Revenue on the 28th day of May, 1873, and no decision has been had thereon, said claim having been returned by said Commissioner to the defendant for amendment on November, 1874, and suit herein was commenced against defendant herein on the 4th day of June, 1874.

That it was the custom of the defendant to furnish to persons desiring to make claims for refund the proper blank form therefor, to wit, Form No. 46, and to fill up said blank form for such claim down to the words "for the following reasons, viz," and the claimant thereupon inserted the grounds of his claim and signed and made oath to such claim,
38 and returned the same to the defendant, who thereupon caused the proper certificates to be annexed, and forwarded the same to the Secretary of the Treasury. This procuring of certificates by the defendant was done as a favor to claimant, and was not a part of his duty. That the plaintiff's claim for refund was never decided by the Secretary of the Treasury, but was returned by him to the defendant for amendment. And I find as

CONCLUSIONS OF LAW.

I. That the tax was illegally exacted of defendant.

II. That the above action is barred by section 44 of the act of June 6, 1872. (U. S. Statutes at Large, vol. 17, page 257.)

Judgment is therefore rendered for the defendant for the dismissal of the complaint with costs.

(S'g'd) N. SHIPMAN, *Judge.*

39 (Endorsed:) U.S. circuit court. Michael Retzer, plaintiff, against Alfred M. Wood, defendant. Findings. Stanley, Brown & Clarke, attorneys for plaintiff, 195 Broadway, New York.

To S. L. WOODFORD, Esq.,
Attorney for Def'ts:

Take notice that the within findings will be presented for settlement to

Hon. Nathaniel Shipman, the justice before whom this cause was tried, at the U. S. circuit court rooms, in the city of New York, on January 13, 1880, at 11 o'clock a. m., or as soon thereafter as counsel can be heard.

Dated N. Y., Jan'y 5, 1880.

STANLEY, BROWN & CLARKE,
Pl'ff's Att'ys.

40 Service of a copy of the within proposed findings and notice of settlement thereof is hereby admitted.

N. Y., Jan'y 5, 1880.

STEWART L. WOODFORD,
U. S. Attorney.

(W. E. W.)

U. S. circuit court. Filed Jan. 14, 1880. John I. Davenport, clerk.

41 *Bill of exceptions.*

Circuit court of the southern district of New York, in the second circuit.

MICHAEL RETZER
ag'st
ALFRED M. WOOD.

Afterwards, to wit, on the 30th day of October, 1879, at a stated term of this court, begun and holden at the city of New York, to wit, the third Monday of October, 1879, before the honorable Nathanial Shipman, district judge of the United States for the State of Connecticut, appointed to hold the said circuit court, according to the form of the statute in such case made and provided, the aforesaid issue so joined, as between the said parties as aforesaid, as by the record more fully appears, came on to be tried by the court, without the intervention of a jury, upon stipulation by the parties in writing waiving a jury, duly filed with the clerk, the said
42 plaintiff being represented by William Stanley, esq., and the said defendant by E. D. Hill, esq.

And in the course of the trial the said counsel for the plaintiff did take and allege sundry exceptions to the rulings of the court, as then and there prayed for by him, which said exceptions are hereinafter severally set forth.

To maintain the issue on the part of the plaintiff, counsel for the plaintiff introduced in evidence the following statement of facts:

It is agreed that the defendant Wood was the collector of internal revenue for the 2nd collection district of New York, from the 10th day of October, 1862, to the seventh day of August, 1868, and that plaintiff resided in said 2nd collection district during the time above specified.

That in the monthly assessment lists received by said collector for the respective months specified in Schedule A, hereto annexed, were
43 assessments against the plaintiff of the respective amounts set opposite each month respectively, the same being a tax of three per cent. on the gross amounts of the plaintiff's receipts from his business, during the months specified in said schedule, under the provisions of section 104 of the act of Congress entitled "An act to provide internal revenue, &c.," approved June 30th, 1864.

That defendant, as such collector of internal revenue, exacted and col-

lected from plaintiff the said amounts, specified in said Exhibit A, at the several dates therein specified, a tax of three per centum of the gross amounts of the plaintiff's receipts from his business during the respective months stated in said schedule.

That plaintiff's business at the time specified in said Schedule A was the carrying of goods between New York and Brooklyn, and from one place in the city of Brooklyn to another place in the same city.

Plaintiff did not run regular trips, nor over regular routes or ferries, but where ordered.

44 Plaintiff had a place in Brooklyn, where he received orders on a slate from persons who wished articles sent from there to New York, or from one place in Brooklyn to another place in Brooklyn. The goods were carried in wagons. They were of a miscellaneous character, such as boxes of dry goods, barrels of sugar, rolls of sole leather, trunks, and general merchandise.

Plaintiff's said business was done solely upon call and at special requests; and, as requested, plaintiff sent to any part or place in said cities or either of them, and took baggage or freight to any part or place in said cities or either of them.

That a claim, of which the annexed, marked "Schedule B," is a copy, was presented to the Commissioner of Internal Revenue on the 28th day of May, 1873, and no decision has been had thereon; said claim having been returned by said Commissioner to the defendant for amendment on

45 November 13, 1874, and suit herein was commenced against defendant herein on the 4th day of June, 1874.

SCHEDULE A.

Statement of the several amounts of tax on gross receipts paid by Michael Retzer.

Date.	Amounts.	List.	To rev. collector.
1866.			
March 28	$3 90	January	A. M. Wood.
April 18	1 50	February	Do.
May 7	2 65	March	Do.
June 19	2 87	April	Do.
July 19	3 20	May	Do.
1867.			
Feb'y 2	1 67	June	Do.
" 2	2 55	July	Do.
" 2	2 87	August	Do.
" 2	2 57	September	Do.
" 2	2 70	October	Do.
" 2	2 81	November	Do.
" 2	2 50	December	Do.
July 2	1 95	January, 1867	Do.
Oct. 24	9 87	June	Do.
" 24	2 87	July	Do.
Dec. 14	2 87	August	Do.
" 14	3 04	September	Do.
" 14	3 21	October	Do.
46 Dec. 14	2 97	November	Do.
1868.			
Feb'y 24	2 63	December	Do.

47 [Timothy O. Dwight, att'y, No. 70 East 110th st., New York.]

SCHEDULE B.

(46.)

Claim under series 6, No. 14, for taxes improperly paid.

STATE OF NEW YORK,
County of Kings, City of Brooklyn, ss:

Michael Retzer, of the city of Brooklyn and State and county aforesaid, being duly sworn according to law, deposes and says that he is in business for himself only; that he was engaged in the business of local and city express carrying, and that upon the various days of the years 1866, 1867, 1868, and 1869 he was assessed by various assessors of the second district of said State an internal-revenue tax of one hundred and sixty-nine $\frac{31}{100}$ dollars for a tax on the gross receipts of his city express carrying business, which amount he afterwards, on the various days of said years A. D.
48 1866, &c., &c., paid to the various collectors of internal revenue for the said district, which assessment and payment of the aforesaid tax was, as this deponent verily believes, erroneous and improper, for the following reasons, viz: That said claimant was during said years aforesaid engaged in and was carrying on an express carrying business of freight, and was not doing an express business proper, but only a local cartage and *dr*aggage business on "order" or "call" in said city of Brooklyn, as wanted by the patrons of said claimant, and that said claimant did not know on one day where his "orders" or "calls" would require his vehicles to go to the next day, as he did not run his said vehicles on any direct or continuous route, course, or objective point, or cross the ferries by any regular course to and from New York, but only by such ferry as the claimant was the nearest to at the time the last "call" was made, or delivery of
49 freight was done by this claimant. And this deponent now claims that by reason of the aforesaid erroneous assessment and payment of the said sum of one hundred and sixty-nine and $\frac{31}{100}$ dollars, he is therefore justly entitled to have the sum of one hundred and sixty-nine & $\frac{31}{100}$ dollars refunded, and he now asks and demands the same.

And this deponent further makes oath that he has not heretofore presented any claim for the refunding of the above amount or any part thereof.

MICHAEL RETZER.

Sworn and subscribed before me this 23rd day of May, A. D. 1873.
CLARK SMITH,
Notary Public.

50 * Here give post-office address.
† If a member of a firm, state the fact here.
‡ Here state for or upon what the tax was assessed.
‖ If a claim has been presented before, state the fact in lieu of this.

STATE OF NEW YORK,
County of Kings, ss:

I, George G. Herman, clerk of the county of Kings, and clerk of the supreme court of the State of New York in and for said county (said court being a court of record), do hereby certify that Clark Smith, before

whom the annexed deposition was taken, was, at the time of taking the same, a notary public of the State of New York in and for the said county, dwelling in said county, commissioned and sworn, duly authorized to administer oaths for general purposes; and further, that I am well acquainted with the handwriting of such notary, and verily believe the signature to said deposition is genuine.

51 In testimony whereof I have hereunto set my hand and affixed the seal of said county and court this 24th day of May, 1873.

[SEAL.] GEORGE G. HERMAN, *Clerk.*

Assistant assessor's certificate.

I hereby certify that I have carefully investigated the facts set forth in the within affidavit, and that I believe the statements to be in all respects just and true.

, *Assistant Assessor.*

Dated , 187 . division, district.

52 *Assessor's certificate.*

I hereby certify that I have carefully investigated the facts set forth in the within affidavit of , and that I believe the statements to be in all respects just and true; and I further certify that, from present personal examination, I find the sum of dollars and cents reported against said , on page , line of the list on form for , 18 , also the sum of dollars and cents reported against , on page , line of the list on form for , 18 , now on file in my office, and that the tax included in the collector's aggregate receipt for the said list transmitted by me to the Commissioner of Internal Revenue, and that the claim has not heretofore been allowed in any form, said receipt amount' to $.

, *Assessor.*

53 Dated , 187 . district.

Collector's certificate.

I hereby certify that I have carefully investigated the facts set forth in the within affidavit, and am satisfied that the statements are in all respects just and true; and I further certify upon personal examination that I find the sum of dollars and cents reported against the said , on page , line of the list, on form , for , 18 ; and also the sum of dollars and cents reported against , on page , line of the list, on form for , 18 , now on file in my office, and that the same was paid to me on the day of , 18 , and on the day of 18 , and are included in my aggregate receipt for said lists, the receipts amounting to $ and $, respectively, and delivered to the as-

54 sessor to be transmitted to the Commissioner of Internal Revenue,

and that no claim for the assessment herein complained of has heretofore been presented.

_____ _____,
Collector *District.*

Dated , 187 .

If the claim has been presented before the fact should be stated. When two or more assessments are referred to in the claim, the page, line, and form of each and every assessment should be given, both by the assessor and the collector, as indicated in the above certificates.

(Endorsed:) 46. Claim for refunding taxes collected. Series No. 75. No. of draft. $169.31. Michael Retzer, claimant. Post-office
55 address, Brooklyn. Verified by , collector 2nd district of N. Y. Assessed upon gross receipts of cartages. Basis of claim. Gross receipts of cartmen not taxable. Examined and rejected, March 23, 1874, by I. T. Vinson.

Counsel for the plaintiff thereupon introduced evidence tending to show that it was the custom of the defendant to furnish to persons desiring to make claims for refund the proper blank form therefor, to wit, Form No. 46, and to fill up said blank form for such claim down to the words, "for the following reasons, viz:" and that the claimant thereupon inserted the grounds of his claim and signed and made oath to such claim and
56 returned the same to the defendant, who thereupon caused the proper certificate to be annexed, and forwarded the same with said claim to the Secretary of the Treasury, but said procuring of certificates was done as a favor to claimant and not as part of defendant's duty.

No testimony was offered by the defendant.

Counsel for plaintiff thereupon requested the court to render judgment in favor of the plaintiff. The court refused so to do, and counsel for plaintiff duly excepted. The court thereupon directed judgment in favor of the defendant for the dismissal of the complaint, with costs, and counsel for plaintiff duly excepted. And because none of the said exceptions so offered and made to the opinion, instructions, and decisions of the court do appear upon the record of the said trial, therefore, on the prayer of
57 the said plaintiff, by *their* counsel, the said judge has to this bill of exceptions put his seal nunc pro tunc as of the 30th day of October, 1879.

(S'g'd) N. SHIPMAN, *Judge.* [L. S.]

(Endorsed:) U. S. circuit court, so. dist. of N. Y. Michael Retzer, plaintiff, against Alfred M. Wood, defendant. Engrossed bill of exceptions. Stanley, Brown & Clarke, attorneys for , 195 Broadway, New York.

58 Supreme Court of the United States.

MICHAEL RETZER }
vs.
ALFRED M. WOOD. }

Of October term, in the year of our Lord one thousand eight hundred and eighty.

Afterwards, to wit, on the second Monday of October, in said term, before

the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Michael Retzer, by Stanley, Brown and Clarke, his attorneys, and says that in the record and proceedings aforesaid there is manifest error in this, to wit, in the refusal of the court to render judgment in favor of the plaintiff as prayed for by him; in the direction of judgment in favor of the defendant for the dismissal of the complaint with costs; also in that judgment was given for the defendant in error against the plaintiff in error, whereas by the law of the land judgment ought to have been given for the said plaintiff in error against said defendant in error.

59 And the said Michael Retzer prays that judgment aforesaid may be reversed, annulled, and altogether held for naught, and that he may be restored to all things which he hath lost by occasion of the said judgment.

STANLEY, BROWN AND CLARKE,
Attorneys for Plaintiff in Error.

(On margin:) E. C. M.

60 (Indorsed:) U. S. Supreme Court. Michael Retzer v. Alfred M. Wood. Assignmentof errors. Stanley, Brown and Clarke, pl'ff's att'ys, 195 B. way.

Due service of a copy of the within is hereby admitted. N. Y. Sept. 29, 1880.

STEWART L. WOODFORD,
U. S. Att'y.

E. B. H.

U. S. circuit court. Filed Sept. 29, 1880. John I. Davenport, clerk

61 Supreme Court of the United States.

MICHAEL RETZER
vs.
ALFRED M. WOOD.

Of October term, in the year of our Lord one thousand eight hundred and eighty.

Afterwards, to wit, on the second Monday of October, in said term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Alfred M. Wood, by Stewart L. Woodford, his attorney, and says that in the record and proceedings aforesaid, or in giving the judgment aforesaid, there is no error. And he prays that the court may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error; and that the judgment aforesaid, in form aforesaid given and granted, may be in all things affirmed.

STEWART L. WOODFORD,
U. S. Att'y, for Def't.

(On margin:) E. C. M.

62 (Indorsed:) U. S. Supreme Court. Michael Retzer vs. Alfred M. Wood. Joinder in error. Stewart L. Woodford, U. S. att'y,

for def't. Due service of a copy of the within is hereby admitted. N. Y., Oct. 2, 1880. U. S. circuit court. Filed Oct. 4, 1880. Joseph M. Deuel, clerk.

63 *Bond for damages and costs.*

Circuit court of the United States of America for the southern district of New York, in the second circuit.

MICHAEL RETZER
vs.
ALFRED M. WOOD.

Know all men by these presents that we, Melvin Brown, of No. 96 Waverly avenue, Brooklyn, and Leonard E. Curtis, of No. 459 East 57th street, in the city of New York, are held and firmly bound unto the above-named Alfred M. Wood in the sum of two hundred and fifty dollars, to be paid to the said Alfred M. Wood, for the payment of which well and truly to be made we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated the 20 day of September, in the year of our Lord one thousand eight hundred and eighty.

Whereas the above-named Michael Retzer hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named plaintiff shall prosecute said writ of error to effect and answer all damages and costs if he fail to make said writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

MELVIN BROWN. [L. S.]
LEONARD E. CURTIS. [L. S.]

Sealed and delivered and taken and acknowledged this 20 day of September, 1880, before me.

[L. S.] S. F. RANDALL,
Notary Public, Kings Co.

64 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Melvin Brown and Leonard E. Curtis severally, being duly sworn, doth depose and say each for himself that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

MELVIN BROWN.
LEONARD E. CURTIS.

Sworn to this 20th day of September, A. D. 1880, before me.

S. F. RANDALL,
Notary Public, Kings Co.

(Indorsed:) U. S. circuit court. Michael Retzer vs. Alfred M. Wood.

Bond for damages and costs on writ of error. Stanley, Brown & Clarke, pl'ff's att'ys, 195 B'way.

Approved.
Sept. 23d, 1880.

SAM'L BLATCHFORD.

U. S. circuit court. Filed Sep. 24, 1880. John I. Davenport, clerk.

65 UNITED STATES OF AMERICA, *ss:*

To Alfred M. Wood greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, eighteen hundred and eighty, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Michael Retzer is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated New York, September 23d, 1880.

SAM'L BLATCHFORD.

66 (Indorsed:) E. & A. A. 304. U. S. Supreme Court. Michael Retzer, plaintiff in error, against Alfred M. Wood, defendant in error. Original citation. Stanley, Brown & Clarke, pl'ff's att'y, 195 B'way.

(Stamp:) U. S. circuit court. Filed Sep. 24, 1880. John I. Davenport, clerk.

Due service of a copy of the within is hereby admitted.
N. Y., Sept. 24, 1880.

STEWART L. WOODFORD,
U. S. Att'y.

E. B. H.

67 United States circuit court, southern district of New York.

MICHAEL RETZER *vs.* ALFRED M. WOOD. } Judgment.

The issues in this action having been brought on for trial before Mr. Judge Shipman without a jury, at a circuit court of the October term, 1879, and the issues having been tried, and a judgment for the defendant having been duly ordered on the fourteenth day of January, 1880, and his costs having been adjusted at $39.10:

Now, on motion of Stewart L. Woodford, United States attorney, for defendant, it is adjudged that the defendant have judgment against the plaintiffs upon the issues in this action, and that he recover the sum of $39.10, his taxed costs, and have execution therefor.

Judgment signed this sixth day of September, 1880.

J. M. DEUEL, *Dep. Clerk.*

We hereby consent that the foregoing judgment be made a part of the record in the above-entitled action and be attached thereto.

May 28th, 1883.

ELIHU ROOT,
U. S. Att'y.

J. P. A.
WM. STANLEY,
Counsel for Pl'ff in Error.

(Indorsed:) United States circuit court. Michael Retzer vs. Alfred M. Wood. Judgment roll. Stewart L. Woodford, United States attorney, for defendant. Filed , 1878. Costs, $. U. S. circuit court. Filed Sep. 6, 1880. John I. Davenport, clerk.

(Indorsed:) Supreme Court U. S. 1883, October term. No. 75. Michael Retzer, pl'ff in error, vs. Alfred M. Wood & al. Stipulation of counsel and addition to record.

(Stamp:) Office Supreme Court U. S. Filed May 31, 1883. James H. McKenney, clerk.

(Indorsement on cover:) No. 75. Michael Retzer, plaintiff in error, vs. Alfred M. Wood, collector of internal revenue. S. New York C. C. U. S Filed 8th October, 1880.

OCT 15 1888

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 25.

PLAINTIFF'S BRIEF.

We hereby consent that the foregoing judgment be made a part of the record in the above-entitled action and be attached thereto.
May 28th, 1883.

ELIHU ROOT,
U. S. Atty.
J. P. A.
WM. STANLEY,
Counsel for Pl'ff in Error.

(Indorsed:) United States circuit court. Michael Retzer vs. Alfred M. Wood. Judgment roll. Stewart L. Woodford, United States attorney, for defendant. Filed , 1878. Costs, $. U. S. circuit court. Filed Sep. 6, 1880. John I. Davenport, clerk.

(Indorsed:) Supreme Court U. S. 1883, October term. No. 75. Michael Retzer, pl'ff in error, vs. Alfred M. Wood & al. Stipulation of counsel and addition to record.

(Stamp:) Office Supreme Court U. S. Filed May 31, 1883. James H. McKenney, clerk.

(Indorsement on cover:) No. 75. Michael Retzer, plaintiff in error, vs. Alfred M. Wood, collector of internal revenue. S. New York C. C. U. S. Filed 8th October, 1880.

109-185

FILED
OCT 16 1883
A. W. McKENNEY, Clerk

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

RETZER
v.
WOOD.
} No. 75.

PLAINTIFF'S BRIEF.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

MICHAEL RETZER
v.
ALFRED M. WOOD.
No. 75.

PLAINTIFF'S BRIEF.

Statement.

This action was commenced by plaintiff against Wood (as Collector of Internal Revenue) in the Superior Court of the City of New York, by summons dated May 26th, 1874 (Record, 2, fol. 4), to recover sums paid by Mr. Retzer and exacted by Mr. Wood in his official capacity, as and for a tax upon Mr. Wood's draying business, ostensibly under act of June 30, 1864, ch. 173, sec. 104 (13 Stats., 276).

A jury having been waived, the Judge to whom the cause was submitted decided that upon the facts found by him (Record, pp. 10 to 13) the tax was illegally exacted. (*Id.*, fol. 38). He further found, however, "that the above action is barred by section 44 of the act of June 6, 1472, U. S. Stats. at Large, volume 17, page 257." (*Ibid*).

It is of this legal conclusion that we complain, and assign it for error.

The merits having been found in our favor, the only inquiry is as to the correctness of this ruling upon the facts *and upon the pleadings.*

The sums to recover which this suit is brought were collected and "illegally *exacted*" of the plaintiff by the defendant officially at various dates between March 28, 1866, and February 24, 1868. (Record, folios 43 to 45.)

The claim for refund was presented to the Commissioner of Internal Revenue May 28th, 1873. (Rec., fol. 44.)

No decision having been made, the summons in this suit was sued out, as before stated, May 26th, 1874, and the action commenced June 4, 1874.

It was instituted by process of a State court, in favor of one citizen of the State of New York against another citizen of the same State, to recover money the latter had wrongfully extorted from the former. Though the exaction was professedly demanded under the provisions of a Federal statute, the Court below held that these provisions did not authorize the act.

July 14th, 1874, *certiorari* issued to transfer the cause to the Federal court, and was served the next day. (Record, folios 5 to 7.)

The complaint was filed in due form and season. A copy was served in May, 1876, (*Id.* p. 4, bottom,) together with a notice for defendant to plead thereto. (*Ib.*) Previous to service of the rule to plead, the plaintiff had served a copy of his bill of particulars and schedule under his complaint, August 14, 1874. (Rec., p. 5.)

Though the rule, served the day of May, 1876, required the defendant to plead in twenty days after service, no plea was filed till Oct. 2, 1876, when only the plea of the general issue,—that the defendant "did not undertake or promise"—was filed. (Record, pp. 5-6; folios 12 and 13.)

The act of June 6, 1872, § 44, never was pleaded; nor any other statute of limitation; nor any special defence; nor notice given under the general issue of any such defence.

This section of the act of June 6, 1872, c. 315, which the learned judge below held to be a bar to this action, reads:

"Sec. 44. That all suits and proceedings for the recovery of any internal tax alleged to have been erroneously assessed or collected, or any penalty claimed to have been collected without authority, or for any sum which it is alleged was excessive, or in any manner wrongfully collected, shall be brought within two years next after the cause of action accrued and not after; and all claims for the refunding of any internal tax or penalty shall be presented to the commissioner of internal revenue within two years next after the cause of action accrued and not after; *Provided*, That actions for claims, which have accrued prior to the passage of this act, shall be commenced in the courts *or presented to the commissioner of internal revenue*

within one year from the date of said passage; *And provided further*, That where a claim shall be pending before said commissioner the claimant may bring his action within one year after such decision and not after; *And provided further*, That no right of action barred by any statute now in force shall be revived by anything herein contained."

17 Stats., 257–8.

It should be observed that this is the first enactment *prescribing a period* within which an *appeal* to the Commissioner of Internal Revenue must be taken.

The provisions of the pre-existing laws prescribed no such limitation, and the acts prior to July 13, 1866, though they *authorized* an appeal, did not *require* one as a condition of recovery by suit.

Assignment of Errors.

The plaintiff assigns for error:

1. The conclusion of law "that the above action is barred by section 44 of the Act of June 6, 1872 (c. 315), U. S. Stat. at large, Volume 17, pages 257" and 258. (Record, fol. 38.)

2. The refusal to render judgment in favor of the plaintiff. (Record, fol. 56.)

3. The rendition of judgment in favor of the defendant, dismissing the complaint with costs. (*Ibid.*, fols. 38 and 56; also fol. 58.)

BRIEF.

The plaintiff contends: *First*, that his action is not barred by the statute mentioned;—*Second*, that the statute has not been pleaded, and (if otherwise applicable to such a case as this) is therefore not available as a defense to this action.

I.

The Act of June 6, 1872, c. 315, does not bar this suit.

Its fortyfourth section (see *ante*, pp. 2, 3) provides, prospectively, that, as to all causes of action thereafter arising, suits "shall be brought within two years next after the cause of action accrued, and not after." Then comes this proviso, as to causes of action already existing; "that actions for claims which have accrued prior to the passage of this act shall be commenced in the courts OR *presented to the commissioner of Internal Revenue* within one year from the date of said passage." (17 Stats., 258, top.)

The act passed June 6, 1872. Our claim was "presented to the commissioner" May 28, 1873—"within one year." (Record, 15, folio 44.)

The section next provides for claims already presented to the commissioner;—"that where a claim shall be pending before said commissioner, the claimant may bring his action within one year after such decision and not after;" and then concludes with the proviso, "that no right of action barred by any statute *now in force* shall be revived by anything herein contained."

We re-iterate, for the sake of emphasizing, the statement that *this section is the earliest and only provision in internal-revenue legislation making* THE TIME WHEN THE CAUSE OF ACTION ACCRUED *the date from which the period of limitation commences to run;* hence, this provision is *not* made applicable to existing claims.

Contrary to custom as it is to make anything but the accruing of the cause of action the *terminus a quo*, an examination of the earlier statutes incontestibly shows that these claims (in analogy to those for customs-dues illegally exacted) were made an exception to the rule.

As to existing claims, at least, this act of June 6, 1872, § 44, established special and peculiar provisions, discriminating between those then pending and those not pending before the commissioner. Accidentally or otherwise, it omitted to fix any time within which the commissioner was to pass upon pending claims or to authorize suit on them in the absence of such decision if it were never rendered (there being a like omission in the customs-revenue laws), or if it was delayed unreasonably or beyond any specified term; and, making a presentation of a claim to the commissioner equivalent to commencing suit within a year (so far as preventing a bar by lapse of time)—it also omitted to prescribe any limitation of time within which suit must be brought upon claims first presented to the commissioner within the year, and rejected by him. As to existing claims, then, it made special provisions, superseding, and *pro tanto* repealing, those of earlier statutes; but it contained nothing to bar a suit upon a claim situated as ours was. Yet it is this section *only*, and not any clause of any other act, that the Court held to be a bar to this action.

Though every internal revenue law contained *some* provision giving power to the commissioner, upon appeal made to him, to refund illegal exactions, this act of June 6, 1872, c. 315, § 44, is the first *to prescribe a term* within which such appeal must be taken.

See Act of July 1, 1862, c. 119, § 35. (12 Stats., 445.)
Act of March 3, 1863, c. 74, § 31. (*Id.*, 729.)
Act of June 30, 1864, c. 173 § 44. (13 Stats., 239, bottom.)
Act of July 13, 1866, c. 184, § 9. (14 Stats., 111, middle.)

So that prior to June 6, 1873, there was no statutory restraint upon the commissioner's power to refund a tax illegally exacted in 1862.

Reference to the above citations will show that all these statutes except the earliest (July 1, 1862) recognized the liability of

the collecting officers to be sued for illegal exactions, without creating or defining it.

Such was the state of legislation, and of the plaintiff's claim, on the fifth of June, 1872.

Taxes had been "illegally exacted" (Record, fol. 38) of him by the defendant at various times within the six preceding years. At common law, recognized by Congressional action, he had an existing right to sue for the recovery of the sums so paid, provided he first complied with the statutory requirement of an appeal to the commissioner of internal revenue.

The next day (June 6, 1872) the act was approved containing the provision (§ 44) which the learned judge below held to be a bar to our just claim.

That section recognizes three classes of claims; *First*, prospectively, those to arise out of subsequent illegal exactions; *Second*, (ours) those already existing, but not yet brought to the attention of the commissioner, or, perhaps, which had been rejected by him; and, *Third*, those then pending before that officer.

As to the first, it is provided that they must be placed before the commissioner on appeal and be put in suit within two years from the time they accrued.

The next sentence (which applies to this case) is clear and unambiguous. It gives the aggrieved party his option to sue *or* file his appeal, as occasion might require. If his appeal had been rejected, and the claim not barred, he had his year in which to sue. If his appeal had never been presented, he had his year in which to prepare and take it.

If already taken and pending, he could, by the next clause, sue within one year after it was decided, *whenever that might be.*

As already noticed, this section prescribes no time within which suit must be brought upon existing claims, first presented on appeal within the ensuing year; nor any time within which the commissioner must decide pending appeals, or permit suits without such determination.

Analagous to this, we have also called the attention of the court to the fact that no federal statute of limitation prescribes any time within which a suit for customs-dues illegally exacted must be brought, where the Secretary of the Treasury fails to

decide the importer's appeal to him from the action of the collector.

To summarize the dates: The sums sued for were exacted between March 28, 1866, and February 24, 1868; so that, if the six years' limitation of the New York Code applied, only the three earliest items on Schedule A (Record, p. 15), aggregating $8.20, would be barred June 6, 1872, when the act was approved.

"Within one year" from June 6, 1872, *i. e.*, May 28, 1873, the claim was "presented to the commissionner of Internal Revenue."

He never decided the appeal. Our summons was sued out May 26, 1874—within a year of its presentation—but that was not required by the act.

As the act of June 6, 1872, § 44, extends to our claim—manifestly not *then* barred—the privilege of presentation upon appeal to the commissioner at any time within one year from that date, it does not seem to us reasonable to construe the law as intending (what it certainly omits to *say*) that the same year should be running to bar our claim, presented conformably to the tenor of the act.

Certainly, in the absence of any express statement of an earlier bar, a case presented to the commissioner within one year should not be barred till after the lapse of two years from the date of the act; conformably to the principles declared in

Sohn v. Waterson, 17 Wallace, 596.

Hence, the contrary construction put upon this act in the court below was erroneous.

II.

Whatever its proper construction may be, the defendant cannot invoke this statute, nor claim any benefit under it, because *it was not pleaded as a defence to this action.*

The Rev. Stats. of the U. S. reproduces this clause of the Judiciary Act;

"Sec. 721. The laws of the several states * * * shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply;" and the act of June 1, 1872, c. 255, § 5, makes this further requirement;

"Sec. 914. The *practice*, *pleadings* and forms and modes of proceedings in civil causes * * * in the circuit * * courts shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the State, within which such circuit * * courts are held, *any rule of court to the contrary notwithstanding.*"

This means of course that the State law, adopted as the rule of decision,—especially in matters of practice and pleadings,—shall be that law as construed, adopted and enforced in the highest tribunals of that State.

Thus, under the Judiciary Act, this Court changed its construction of a statute of limitation of Tennesse to conform to the construction given to it by the courts of that State. Green vs. Neal, 6 Peters, 291; *Leffingwell v. Warren*, 2 Black, 599.

The act of June 1, 1872, c. 255, § 5 (17 Stats., 197: R. S., § 914 supra), requires the *pleadings* to conform to those in use in the State court.

This cause was removed from the State to the Federal court, July 24th, 1874. The plaintiff filed anew in the latter tribunal his complaint in form as required by the New York Code of Proceedure then in force, Sections 140, 141 and 142, which read thus;—

"§ 140. All the forms of pleading heretofore existing are abolished; and, hereafter, the forms of pleading in civil actions in courts of record, *and the rules by which the sufficiency of the pleadings is to be determined*, are those prescribed by this act.

§ 141. The first pleading on the part of the plaintiff is the complaint.

§ 142. The complaint shall contain:—

1. The title of the cause, specifying the name of the court in which the action is brought, the name of the county in which the plaintiff desires the trial to be had, and the names of the parties to the action, plaintiff and defendant;

2. A plain and concise statement of the facts constituting a cause of action, without unnecessary repetition;

3. A demand of the relief to which the plaintiff supposes himself entitled. If the recovery of money be demanded, the amount thereof shall be stated."

The plaintiff's complaint, adopting the money counts of the former pleading, was a sufficient compliance with these requirements of the Code.

Allen v. Patterson, 7 N. Y., 476.
Farron v. Sherwood, 17 *Id.*, 227.
Moffet v. Sackett, 18 *Id.*, 522.
Hurst v. Litchfield, 39 *Id.*, 377, 380, bottom.

See recent opinion, *per* Brown, J., (So. Dist. of N. Y.), in Muser v. Robertson, 17 Fed. Rep., 504–5.

It was the proper form of declaring anterior to the Code.

2 Greenleaf on Ev., § 121.
Rankin v. Hoyt, 4 How. (U. S.), 327.
Elliott v. Swartout, 10 Pet., 137.
Phila. v. Collector, 5 Wall., 727.
Clinton v. Strong, 9 Johns., 370.

The defendant did *not* comply with the requirements of the then code, which were:—

"§ 143. The *only* pleading on the part of the defendant is either a demurrer or an answer. It must be served within twenty days after the service of the copy of the complaint.

§ 149. The answer of the defendant *must* contain, —

1. A general or specific denial of EACH *material allegation* of the complaint controverted by the defendant, *or of any knowledge or information thereof sufficient to form a belief.*

2. *A statement of any new matter constituting a defence* or counterclaim, in *ordinary* and concise language, without repetition."

Voorhies' Annotated Code, 10th ed., A. D., 1870.

[Memo.—Prior to 1877 proceedings were regulated by the compilation known as "The Code of Procedure." In 1877 there was a revision issued, entitled "The Code of *Civil* Procedure." The provisions as to Complaints and Answers were substantially the same in both, though there were some verbal differences.]

Entirely disregarding the Code, the defendant filed neither answer nor demurrer, but, October 2, 1876, he filed a plea of the general issue, (Record, p. 7, bottom, and 8, top.) without any notice of special matter of defence to be proved under it.

Even under common law pleadings, a statute of limitation (or other defence to defeat a cause admitted once to have existed) cannot be set up to bar the action under a plea of the general issue, without notice.

The Statute of Limitations must be set up "in the pleadings previously to the hearing; it will not be raised by the Court unsolicited." Wood on Lims., 15, § 7.

It is not merely the Statute of Limitations, but "*all* matters in confession and avoidance by way of discharge" (as Chitty phrases it) that must be so pleaded, 1 Chitty on Pl. (7th Eng. ed.), 504–506, where he classes it with defence of payment, release, performance, etc., etc. Evans v. Williams, 60 Barb., 346, cited *infra.*

See discussion of the subject in opinion per Selden, J., in *McKyring v. Bull*, 16 N. Y., 297; and in Smart v. Baugh, 3 J. J. M., 368; *Id.*, 374.

In Brickett v. Davis, 21 Pick., 404, no plea of the statute, or notice of it under the general issue having been filed, proof of slanderous words uttered more than two years before was admitted.

In *Brand v. Longstreet*, 4 New-Jersey Law, 325, (A. D., 1816.) proof of words uttered *fourteen* years before was admitted in support of an action for slander, the statute not having been pleaded; and the court considered it "surprising" that counsel should raise the question of its admissibility at that late day.

In *Heath v. Page*, 48 Penn. St., 130, the statute was said to be "waived" if not pleaded; so said in Ohio and Kentucky.

Webster v. Newbold, 41 Penn. St., 482.
Robbins v. Harvey, 5 Conn., 335.
Rankin v. Turney, 2 Bush, 556; 5 Bush, 86.
Whitney v. Whitney, 5 Dana, 331.
Vose v. Woodford, 29 Ohio St., 245.

The old form of the general issue is not a denial of *each* material allegation, and of knowledge or information on the part of the defendant sufficient to enable him to form a belief as to the truth of every such separate allegation. Baker vs. Bailey, 16 Barb., 57, 58.

The purpose of the code was to ascertain just what of the *facts* stated in the complaint the defendant admitted, and what he denied, which latter only were to be proved. He could re-

quire proof of these only by stating that he was not sufficiently cognizant or informed of them to enable him to form any *belief* as to them.

"By the system introduced by the code of procedure all *general issues* were abolished; and the pleader was required to set forth the *very facts* on which he placed his defence. Formerly, in an action of debt, under the plea of *non est factum*, the defendant might prove control, lunacy * * * and many other defences which would tend to show that the deed was not (at the time of pleading) *in law* the deed of the defendant. Now, I apprehend, the pleader must *set out the facts* that constitute the *cause of action* or the *ground of defense* in ordinary and concise language, and in such a manner as to enable a man of common understanding to know what is intended. Code §§ 142, 149. In obedience to this requiremeut, the pleader must set forth the facts that constitute his defense, in each of the above cases. He must show the *fact* that defendant was a married woman or lunatic; that the deed was tainted with usury," etc., etc.—Baker v. Bailey, 16 Barb., 57, *et seq.*

Lewis v. Gould, 13 Blatch., 216.

The "Daily Register" of October 4, 1883, contains the full text of an opinion of the New York Supreme Court in Hall vs. U. S. Reflector Co., denying the right of a party to avail himself of *any* defence at the trial which he has not indicated in his answer; even though that defence be *not* one which the code expressly requires to be taken by answer. Reversing the judgment of the court below, this opinion declares:

"To avoid the possibility of surprise, the law requires that each party shall be apprised substantially of the ground intended to be relied upon by his adversary in the course of the trial when that may take place. When the pleadings fail to do that, the party chargeable with the failure can derive no advantage from evidence appearing upon the trial tending to establish the existence of a cause of action or defense not included in his pleadings. McKyring v. Bull, 16 N. Y., 297; *Saraway v. Perkins*, 10 N. Y., 371; Brazill v. Isham, 12 N. Y., 9; Rubber Co. v. Goodyear, 9 Wall., 793, top; Hudson v. Swan, 83 N. Y., 552; Southwick v. First Nat. Bank, 84 N. Y., 420. As the case was presented, the defenses relied upon by the defendant [*i. e.*, in his answer] were neither of them proved, *but the plaintiffs have been defeated in their right to recover the money loaned by*

them by a defence to which there was no reference whatever in the defendant's answer, and which they consequently could not anticipate and *were not legally required to meet.* The result is that *the judgment under these circumstances cannot be sustained.*"

In the paragraph of the opinion preceding that above quoted the Court observe that the Referee, upon whose report judgment was entered

"Was only authorized to hear and determine the issues which the parties themselves had framed; *he had no authority under which he could defeat the action upon the ground of a defense which the defendant had neglected to bring into the case.* The rule on this subject has become very well settled under the code, as it also was under the preceding practice."

The judge sitting in this cause had no more authority to interpose a defense not set up in the defendant's pleading.

Our objection to the interposition of a statutory limitation to defeat our action would, as we have shown, be equally valid under the common-law as under the code system of pleading. U. S. v. Shorey, 9 Int. Rev. Rec., 201.

"Anything which tended to show that a party to an instrument *never had a cause of action* against the other party to it was always competent under a general denial of the cause of action, and is so still. * * * A general denial now, like the general issue under the former practice, puts in issue the existence, at any time, of the cause of action alleged in the complaint, and admits of evidence to establish such defense. *If a cause of action has once accrued* or existed, and has been satisfied or *defeated by reason of something that has accrued subsequently, that is new matter, which must be pleaded,* in order to render it competent as evidence."

Evans v. Williams, 60 Barb., 348, and cases cited *supra;* Drake v. Cockcroft, 4 E. D. S., 37, paragraph below middle of page.

The defendant cannot say that the statute needed not to be set up as a defence by way of answer, because the complaint indicated the items to be more than six years old. The New-York Courts have repeatedly held it to be *improper* for the plaintiff to state in his complaint those facts which take his

case out of the statute of limitations, even though without such statement they are apparently barred by the lapse of time.

Sands v. St. John, 36 Barb., 628 & 23 How. Pr., 140.
Hyde v. Van Valkenberg, 1 Daly, 418, and cases cited at beginning of op.
Butler v. Mason, 5 Abb.. 40 & 16 How. Pr., 546.

In the last cited case the court struck out of the complaint, as irrelevant and redundant, allegations showing that the claim, though more than six years old, was not barred, saying that the code, § 74 [see *supra*] required the defense to be raised by answer.

The New York courts have also uniformly held that the defendant cannot avail himself of any such defence which he has failed to set up in his answer, even if the facts which constitute it are brought out in the plaintiff's evidence.

Brazill v. Isham, 12 N. Y., 9, affirming 1 E. D. S., 437.
Paige v. Willett, 38 N. Y., 31, middle.

Even where the action is to recover a penalty.

Cotton v. Maurer, 3 Hun, 552.

And they have invariably held that the failure to plead any such statutory bar, or like "new matter," to be some that could not be amended at the trial.

Jackson v. Varick, 2 Wend., 294.
Dezengremel v. Dezengremel, 24 Hun, 457, (A. D., 1881.)
Williams v. Willis, 15 Abb., New Ser., 11.

It is not, however, simply upon the provisions of the Code upon the general subject of pleading that we are left to rely, although these are ample for our purpose.

The Code of Procedure in force when this cause was brought and the pleadings therein filed provided that;—

"§ 74. Civil actions can only be commenced within the periods prescribed in this title, after the cause of action shall be accrued, except where, in special cases, a different limitation is prescribed by statute, and in the cases mentioned in section seventy-three." [Those then pending.]

"But *the objection that the action was not commenced within the time limited can only be taken by answer.*"

Sands v. St. John, 36 Barb., 628, and 23 How. Pr., 140.
Stewart v. Smith, 14 Abb., 75.
Lefferts v. Hollister, 10 How. Pr., 383.
Van Vleck v. Burroughs, 6 Barb., 341.
Dezengremel v. Dezengremel, 24 Hun, 457.
Humphrey v. Persons, 23 Barb., 313.
Bihrin v. Bihrin, 17 Abb. Pr., 27.
Clinton v. Eddy, 1 Lans., 63.

For a statement in an answer declaring the claim 'outlawed,' &c., &c., held March 20, 1883, *not* to interpose the bar of the statute of limitations, see Budd v. Walker, 3 Civ. Pro. Reps., 422, 426.

Obviously, then, the objection which prevailed against us in the court below would have been no obstacle at all to our recovery had this suit, between citizens of New-York, remained in the court where it was originally rightfully commenced.

Yet, the act of June 1, 1872, c. 197, § 5, was designed "to bring about uniformity in the law of procedure in the Federal and State courts of the same locality;" and "this was done by bringing about the conformity in the courts of the United States which it prescribes."

Swayne, J., in Nudd v. Burrows, 91 U. S., 441.

"The object was to assimilate the form and manner in which parties should present their claims and defences, in the preparation for and trial of suits in the federal courts, to those prevailing in the courts of the State."

Gray, J., in U. S. v. Train, 12 Fed. Rep., 853.
Bills v. N. O. R. R., 13 Blatch., 228.

The case of *Chemung CanalBank v. Lowery*, 93 U. S., 72, would seem to be decisive of the one at bar.

There it was held that the objection of the Statute of Limitations could be raised by demurrer in the U. S. Circuit Court sitting in Wisconsin, *because* it could be so raised in the courts of that State—according to Howell v. Howell, 15 Wis., 55, there cited, although the earlier case of Peck v. Cheney, 4 Wis., 249, seems to look the other way.

To our complaint no demurrer was filed. The New-York

courts have uniformly held, as have those of other states, that the objection can *not* be raised by demurrer.

Sands v. St. John, 36 Barb., 628, and other cases cited *supra;* Green v. R. R., 73 No. Car., 524.

Hence, it can "only be taken by answer" in the Federal courts sitting in the State of New-York; otherwise it will be deemed to have been waived.

Such being the *law*, upon the facts found, a judgment for the plaintiff, instead of for the defendant, was the one imperatively required; and its entry should now be directed.

The construction by which the learned judge below held that the statute barred our claim seems to us to have even less justification in law than that by which the same court ruled the Statute of Limitations to be a bar in the case of Goldenberg v. Murphy, 107 U. S.

III.

We have not attempted any discussion of the merits, because the decision of the court below, in our favor on that point, was in conformity with the ruling of Commissioner Orton upon that subject, and followed the adjudication of the like case of *Dodd v. Spaulding*, acquiesced by the government. (Not reported.)

This court held, in *U. S. v. Savings Bank*, 104 U. S., 728, that when his claim had been filed with the proper collector of internal revenue, the taxpayer had done all he could to obtain the restitution to which he was entitled, so far as appeal to the commissioner is concerned.

WILLIAM STANLEY,
EDWIN B. SMITH,
Of counsel for Plaintiff in error.

STANLEY, CLARKE & SMITH,
160 Broadway, New-York,
Attorneys for the plaintiff.

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SUPREME COURT U.S.
FILED
OCT 23 1883
JAMES H. McKENNEY, Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1883.

RETZER
v.
WOOD, COLLECTOR, &C. } No. 75.

BRIEF FOR THE COLLECTOR.

In the Supreme Court of the United States.

OCTOBER TERM, 1883.

RETZER
v.
WOOD, COLLECTOR, &c. } No. 75.

BRIEF FOR THE COLLECTOR.

This is an action begun May 26, 1874, to recover taxes exacted of the plaintiff as *a person doing an express business* during the years 1866, '67, and '68.

The facts were agreed upon by the parties, and appear upon the record. (Folios 14, &c.)

His Honor below held (folio 38) that—

I. The tax was illegally exacted;

II. The action is *barred* by section 44 of the act of 1872, ch. 315.

The statutes pertinent to the case are:

1. 1864, ch. 173, sec. 104:

That any person, firm, company, or corporation carrying on or

doing an express business shall be subject to and pay a duty of three per centum on the gross amount of all the receipts of such express business. (13 Stat., 276.)

2.—1864, ch. 173, sec. 44:

That the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, shall be, and is hereby, authorized, on appeal to him made, to remit, refund, and pay back all duties that shall appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected, and also to repay to collectors the full amount of such sums of money as shall or may be recovered against them or any of them in any court, &c. (13 Stat., 239. See R. S., sec. 3220.)

3.—1872, ch. 315, sec. 44:

That all suits and proceedings for the recovery of any internal tax alleged to have been erroneously assessed or collected, or any penalty claimed to have been collected without authority, or for any sum which it is alleged was excessive, or in any manner wrongfully collected, shall be brought within two years next after the cause of action accrued, and not after; and all claims for the refunding of any internal tax or penalty shall be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued, and not after: *Provided, That actions for claims which have accrued prior to the passage of this act shall be commenced in the courts or presented to the Commissioner of Internal Revenue within one year from the date of said passage: And provided, further,* That where a claim shall be pending before said Commissioner the claimant may bring his action within one year after such decision, and not after: *And provided further,* That no right of action barred by any statute now in force shall be revived by anything herein contained. (17 Stat., 257.)

[The above act of 1872 has been reproduced in the Revised Statutes in the following form:

SEC. 3227. No suit or proceeding for the recovery of any inter-

nal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, shall be maintained in any court unless the same is brought within two years next after the cause of action accrued: *Provided*, That actions for such claims which accrued prior to June six, eighteen hundred and seventy-two, may be brought within one year from said date; and that where any such claim was pending before the Commissioner, as provided in the preceding section, an action thereon may be brought within one year after such decision and not after. But no right of action which was already barred by any statute on the said date shall be revived by this section.

SEC. 3228. All claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, must be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued: *Provided*, That claims which accrued prior to June six, eighteen hundred and seventy-two, may be presented to the Commissioner at any time within one year from said date. But nothing in this section shall be construed to revive any right of action which was already barred by any statute on that date.]

A.

1. *Upon the face of the record it appears that an answer setting up the statute of limitations would have stated a good defense.*

The right of action for that part of the present claim which is of latest date commenced February 24, 1868 (fo-

lio 17); and this suit was brought in May, 1874, more than six years afterwards. At the time of the passage of the above act of 1872 (June 6) the right of action had been in existence for more than four years, and, granting that at that time it still existed, this suit was not brought until nearly *two* years after such passage.

The act of 1872 requires that suits for claims already accrued at the time of its passage should be brought *within one year* from such passage. This, of course, implied that any condition precedent to suing must be performed so as to allow to such provision its due effect; *e. g.*, if an appeal to the Commissioner were a prerequisite, that appeal must be taken at such time that suit also could be begun within the one year limited therefor.

So far, therefore, as an *appeal* to the Commissioner was an incident to a subsequent suit, the limitation upon the latter operated to limit the former as well.

But inasmuch as the *appeal* might itself give the relief desired, it was proper to impose an express limitation upon that, and accordingly the statute so does, putting it in that regard upon the same footing as the *suit*. But for such express limitation there would have been nothing to prevent a claimant from making a successful *appeal* at the end of ten or more years after payment.

Such is the force of the *words* of the act of 1872, and the fact that no public policy existed at that time to contradict those words is indicated by the way in which almost

contemporaneously the Revised Statutes (as above quoted) analyze and reproduce them.

2. The learned judge below evidently considered that the parties had submitted to him, amongst other things, an issue upon the statute of limitations.

(*a.*) This is, in the first place, a matter of *general presumption*, arising from the precise and formal finding that he actually made as to the applicability of the statute.

(*b.*) In the next place, the stipulation for a trial by the court, signed by the attorneys, speaks of the ISSUES in the above action.

(*c.*) So does the preamble to the findings.

(*d.*) The bill of exceptions makes no reference to any attempt to correct the evident misapprehension of the judge in this respect.

Supposing then that the errors here alleged, being upon the record proper, may be made avail of in the first instance *in this court*, still the Government is entitled to all the benefit that can be claimed from the circumstance that the trial below appears to have been carried on upon a theory which would have supported the judgment; therefore

(3.) Upon this view of the case, the proper course is to reverse the judgment and remand the record, *so that the proper amendments may be made.* (Garland *v.* Davis, 4 How., p. 154.)

B.

It was, however, competent for the defendant to call the attention of the court to the defense under the Statute of Limitations *at the trial.* (Upton *v.* McLaughlin, 105 U. S., 645.)

C.

If the above suggestions be not correct, I shall submit that upon the *record* of facts agreed it appears that the error alleged is immaterial, as there is nothing in the special features of the business of this plaintiff to exclude him from the purview of the statute of 1864, first-above quoted. There seems to be nothing in the circumstance that his business was occasional, or had no special termini, to render it against any apparent *policy* of the statute that he should not pay tax upon the gross receipts from such business. And in the mean time he seems to be plainly within the *words* of the act.

S. F. PHILLIPS,
Solicitor-General.

O